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No. 91-1513

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF THE TREASURY AND
MITCHELL A. LEVINE,
ASSISTANT COMMISSIONER, PETITIONERS

v.

GEORGE FABE, SUPERINTENDENT OF INSURANCE,
STATE OF OHIO

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The federal priority statute, 31 U.S.C. 3713(a), requires that a debtor's obligations to the United States be given first priority in state insolvency proceedings. An Ohio statute provides that claims of the United States are entitled to fifth priority in proceedings to liquidate an insolvent insurance company. The federal priority statute preempts the state priority statute unless the state statute is subject to the anti-preemption provisions of the McCarran-Ferguson Act, 15 U.S.C. 1012. Accordingly, the question presented is:

Whether a state statute establishing the priority of creditors' claims in a proceeding to liquidate an insolvent insurance company is a law regulating "the business of insurance" within the meaning of the McCarran-Ferguson Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 939 F.2d 341. The opinion of the district court (Pet. App. 31a-49a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 50a-51a) was entered on July 17, 1991. A petition for rehearing was denied on November 21, 1991. Pet. App. 52a-53a. On February 10, 1992, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including March 20, 1992. The petition was filed on March 17, 1992, and was granted on May 18, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, Clause 2 of the United States Constitution; 31 U.S.C. 3713; 15 U.S.C. 1012; and Ohio Rev. Code Ann. §§ 3903.02(D) and 3903.42 (Anderson 1989) are reproduced as an appendix to this brief. See App., *infra,* 1a-5a.

STATEMENT

1. On April 30, 1986, the Court of Common Pleas for Franklin County, Ohio, declared American Druggists' Insurance Company (ADIC) insolvent. The court ordered that ADIC be liquidated and appointed respondent, Ohio's Superintendent of Insurance, as liquidator. Pet. App. 2a.

The United States filed claims in the state liquidation proceedings in excess of $10.7 million on immigration, appearance, performance, and payment bonds issued by ADIC as surety. The United States asserted that its claims are entitled to first priority under the federal priority statute, 31 U.S.C. 3713(a)(1)(A). Pet. App. 2a. See App., *infra,* 1a.

Respondent brought a declaratory judgment action in federal district court seeking to establish that the federal priority statute does not preempt an Ohio statute that establishes the priority of claims in insurance liquidation proceedings. Under the Ohio statute, claims of federal, state, and local governments are entitled to fifth priority, ranking behind (1) administrative expenses, (2) wage and benefit claims, (3) policyholders' claims, and (4) claims of general creditors. Ohio Rev. Code Ann. § 3903.42 (Anderson 1989); see App., *infra,* 2a-4a. Respondent argued that the Ohio priority statute, rather than the federal priority statute, determines the priority of claims of the United States because of the anti-preemption provisions of the McCarran-Ferguson Act, 15 U.S.C. 1012. Pet. App. 2a-3a; see App., *infra,* 1a-2a.

2. The district court entered summary judgment for the United States. Pet. App. 31a-49a. The court first concluded that the federal priority statute governs the priority of claims of the United States against an insolvent insurer unless the Ohio priority statute is a law regulating "the business of insurance" within the meaning of the McCarran-Ferguson Act, 15 U.S.C. 1012. The court then applied this Court's three-part test for determining whether a practice is part of the business of insurance. That test looks to:

> [F]*irst,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry.

Pet. App. 36a (quoting *Union Labor Life Ins. Co.* v. *Pireno,* 458 U.S. 119, 129 (1982)). As to the first factor, the court concluded that "the liquidation process, with its prioritization and payment of claims, does not involve the transfer [or] spreading of policyholder risk." Pet. App. 41a. As to the second factor, the court concluded that "[t]he contractual liability [to] pay on a policy of insurance is obviously distinct from the question of who gets paid first." *Ibid.* (quoting *Gordon* v. *United States Dep't of the Treasury,* 668 F. Supp. 483, 491 (D. Md. 1987), aff'd, 846 F.2d 272 (4th Cir.), cert. denied, 488 U.S. 954 (1988)). As to the third factor, the court observed that the Ohio priority statute "[a]ffects the claims of various types of creditors," and therefore is not limited to entities within the insurance industry. Pet. App. 41a. The court also noted that "[i]nsolvency and priority statutes * * * are not peculiar to the insurance industry." *Ibid.* (quoting *Gordon,* 668 F. Supp. at 491)). Accordingly, the district court held that a state statute determining the priority of claims against an insolvent

insurance company does not regulate the "business of insurance" within the meaning of the McCarran-Ferguson Act, and therefore the claims of the United States against ADIC are entitled to first priority under the federal priority statute.[1]

3. The court of appeals reversed. Pet. App. 1a-30a. The court of appeals, like the district court, applied *Pireno*'s three-part test for determining whether a practice is part of the business of insurance. *Id.* at 9a-11a. The court of appeals also recognized that two other courts of appeals have "rejected the argument that * * * liquidation priority statutes * * * regulate[ ] the 'business of insurance.' " *Id.* at 15a (citing *Idaho ex rel. Soward* v. *United States*, 858 F.2d 445 (9th Cir. 1988), cert. denied, 490 U.S. 1065 (1989); *Gordon* v. *United States Dep't of the Treasury*, 846 F.2d 272 (4th Cir.) (per curiam), cert. denied, 488 U.S. 954 (1988)). The court nevertheless held that the Ohio priority statute regulates the business of insurance because it "is a state regulation which protects the interests of the insured." Pet. App. 20a.

The court then held that the Ohio statute meets all three parts of *Pireno*'s tripartite test. First, the court concluded that the Ohio priority statute has the effect of transferring and spreading the policyholder's risk that the insurer will become insolvent. Pet. App. 21a-22a. Second, the court concluded that the priority statute is an integral part of the insurer-insured relationship because the statute is designed to protect that relationship by providing assurances as to the reliability of insurance policies. *Id.* at 22a. Finally, although

[1] The district court also held that claims of laborers, materialmen, and subcontractors suing on payment bonds under the Miller Act, 40 U.S.C. 270b, are not claims of the United States for purposes of the federal insolvency statute. See Pet. App. 45a-48a. The government did not appeal from that ruling.

recognizing that not all creditors of an insolvent insurance company are policyholders, the court nevertheless concluded that the third prong of *Pireno* was satisfied because the "focus" of the statute is the protection of policyholders. *Id.* at 23a.

Judge Edgar concurred separately. Pet. App. 23a-25a. He observed that, in enacting McCarran-Ferguson, Congress intended "to restore the law to its status prior to [*United States* v.] *South-Eastern Underwriters [Ass'n*, 322 U.S. 533 (1944)]." Pet. App. 24a. Judge Edgar concluded that McCarran-Ferguson did not modify the "long standing, traditional state regulation of insurance company liquidations," and therefore did not modify the type of regulation at issue in this case. *Ibid.*

Judge Jones dissented. Pet. App. 25a-30a. As to the first *Pireno* factor, he concluded that the risk of insurer insolvency is "qualitatively distinct from the risk the policyholder seeks to transfer in an insurance contract." *Id.* at 27a (quoting *Gordon*, 846 F.2d at 273). Judge Jones therefore rejected the majority's conclusion that the priority statute involves risk transfer and risk spreading. Judge Jones reasoned that the majority's view was contradicted by this Court's conclusion in *Pireno* that "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties – the insurance policy – and that transfer is complete at the time that the contract is entered." Pet. App. 27a (quoting 458 U.S. at 130). As to the second *Pireno* factor, Judge Jones concluded that the priority statute is not an integral part of the policy relationship. "Rather than playing an integral role in the policy relationship between insurer and insured," the Ohio priority statute instead "addresses 'the relationship between those left in the lurch by the expiration of the insurer.' " Pet. App. 29a (quoting *Soward*, 858 F.2d at 454). Finally, Judge Jones found that the third *Pireno* factor also supported preemption because

the Ohio priority statute is not limited to entities within the insurance industry, but instead governs the rights of all creditors. *Id.* at 30a.

SUMMARY OF ARGUMENT

1. The federal priority statute requires that claims of the United States against insolvent debtors be accorded first priority in state insolvency proceedings. Congress enacted a federal priority statute in the earliest days of the Republic; the statute has remained in effect with little substantive change for two centuries. Statutory priority for federal claims serves the vital purpose of securing an adequate federal revenue.

By its terms, the federal priority statute applies to the claims at issue in this case. Those claims are "claim[s] of the United States Government." See 31 U.S.C. 3713. In addition, ADIC has been declared insolvent, and the appointment of respondent to serve as liquidator of ADIC was a classic "act of bankruptcy" within the meaning of the statute. The Ohio priority statute directly conflicts with the federal priority statute because it ranks claims of the United States behind numerous other claims, including claims of general business creditors. Under ordinary principles of preemption, the federal priority statute applies to the claims of the United States and preempts inconsistent state law.

2. a. The McCarran-Ferguson Act does not require a different result. That Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). The Court has consistently distinguished between laws "regulating the business of insurance" and those regulating a variety of other corporate activities conducted by insurers.

The plain language of the McCarran-Ferguson Act answers the question presented in this case. The Ohio priority statute was not "enacted * * * for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). The purpose of the statute is to regulate the priority of competing claims of creditors in an insolvency proceeding, and to displace the historic superiority of federal claims. The law does not regulate the terms of insurance policies, or any other aspect of the commercial activities of insurers. Indeed, the statute is not even addressed to insurers. Instead, it is addressed to the liquidator or trustee of the "estate" of a defunct insurance company, and applies only when the business of the defunct company has been wound up and its assets are being distributed to its creditors.

b. Although the plain language is dispositive here, this textualist interpretation is confirmed by application of the *Pireno* test. Under that test, the Court considers (1) whether the practice at issue has the effect of transferring and spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119, 129 (1982). Each of these factors confirms what the plain language suggests: the Ohio priority statute does not regulate the business of insurance.

An essential characteristic of the business of insurance is the spreading and underwriting of risk. The transfer of risk from the insured to the insurer is effected by means of the contract of insurance. It is complete at the time the parties enter into the contract. *Pireno*, 458 U.S. at 130. The Ohio statute does not result in any underwriting or investment risk-taking by the insurance company. The risk that the insurance company will become insolvent is not a risk covered by the insurance contract or transferred at the

time the parties enter into the contract. Instead, that risk remains with the policyholders and other creditors of the insurance company. The state insolvency statute merely determines the order in which creditors' claims will be paid.

Nor is the state priority statute integral to the relationship between the insurance company and the insured. The statute is distinct from the contract of insurance. And the statute comes into play only if the insurance company becomes insolvent and is liquidated. In that event, the insurance company ceases to exist and the relationship between the insurance company and the insured is terminated. Rather than addressing the relationship between the insurance company and the insured, the statute addresses the relationship between policyholders and other creditors of the defunct insurer.

In addition, the state priority statute plainly is not limited to entities in the insurance industry. Instead, it applies to all creditors of insolvent insurance companies, including employees and general business creditors. A priority statute does not regulate the business of insurance, but instead is a standard feature of bankruptcy laws.

3. In prior cases, this Court has defined the "business of insurance" through examination of McCarran-Ferguson's enactment history. To the extent the Court repairs to the measure's legislative background, that history strongly reinforces the conclusion that a statute regulating the priority of federal claims against an insolvent enterprise that formerly sold insurance is not a law regulating the "business of insurance." Congress passed the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance transactions are subject to federal regulation under the Commerce Clause. The Act was intended to "turn back the clock" to pre-*South-Eastern Underwriters* days by ensuring that the States could continue to regulate and tax

insurance companies. The Court has accordingly held that the Act should "be read as protecting the right of the States to regulate what they traditionally regulated." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 (1979). That reading of McCarran-Ferguson precludes assumption of State control over the question whether federal claims are superior to the claims of other creditors in dissolution proceedings.

Prior to the Court's decision in *South-Eastern Underwriters*, it was well established that the federal priority statute applied in state proceedings to liquidate insolvent insurance companies and preempted inconsistent state law. *United States* v. *Knott*, 298 U.S. 544 (1936). The federal priority statute was an exercise of Congress's power to establish bankruptcy laws. Consequently, the "business of insurance" should not be construed to displace the supremacy of federal law in resolving the priority of the United States' claims against a defunct insurance company. That subject was not "traditionally regulated" by the States.

ARGUMENT

CLAIMS OF THE UNITED STATES ARE ENTITLED TO FIRST PRIORITY IN A PROCEEDING TO LIQUIDATE AN INSOLVENT INSURANCE COMPANY

A. The Federal Priority Statute Applies to Claims of the United States Against Insolvent Insurance Companies

1. The federal priority statute provides in part that "[a] claim of the United States Government shall be paid first when * * * a person indebted to the Government is insolvent and * * * an act of bankruptcy is committed." 31 U.S.C. 3713(a)(1)(A); App., *infra*, 1a. Congress enacted a federal priority statute in "the earliest days of the Republic" (*United States* v. *Key*, 397 U.S. 322, 324 (1970)), pursuant to the constitutional grant of authority "[t]o establish * * * uniform laws on the subject of Bankruptcies throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. The origins

of the statute "reach back even further into the English common law," under which "the Crown exercised a sovereign prerogative to require that debts owed it be paid before the debts owed other creditors." *United States* v. *Moore*, 423 U.S. 77, 80 (1975). See 33 Hen. 8, ch. 39, § 74 (1541); 13 Eliz. 1, ch. 4 (1570).[2]

The first federal priority statute – the fifth statute enacted by the First Congress – applied to debts due to the United States for customs duties. See Act of July 31, 1789, ch. 5, § 21, 1 Stat. 42. In 1797, Congress amended the statute to extend its coverage to any "person hereafter becoming indebted to the United States, by bond or otherwise." Act of Mar. 3, 1797, ch. 20, § 5, 1 Stat. 515. In 1799, Congress further amended the priority statute to provide that the administrator of any insolvent or decedent's estate is personally liable for any amount not paid to the United States because the administrator gave another creditor preference. See Act of Mar. 2, 1799, ch. 22, § 65, 1 Stat. 676; 31 U.S.C. 3713(b). The federal priority statute has remained in force for two centuries. Indeed, "[t]he 1797 and 1799 Acts have survived to this day essentially unchanged." *Moore*, 423 U.S. at 81.[3]

[2] Many of the States assert a similar priority as an incident of sovereignty. See *United States* v. *Moore*, 423 U.S. 77, 80 (1975) (citing *Pauley* v. *California*, 75 F.2d 120, 133 (9th Cir. 1934); *People* v. *Farmers' State Bank*, 167 N.E. 804 (Ill. 1929); *In re Carnegie Trust Co.*, 99 N.E. 1096, 1098-1099 (N.Y. 1912); *State* v. *Bank of Maryland*, 26 Am. Dec. 561 (Md. 1834)).

[3] In 1978, Congress amended the federal priority statute to make clear that it does not apply in proceedings under the federal Bankruptcy Code. See Act of Nov. 6, 1978, Pub. L. No. 95-598, § 322(a), 92 Stat. 2678. Similarly, the federal Bankruptcy Code does not apply to insurance companies. See 11 U.S.C. 109(b)(2), 109(d). Accordingly, the provisions of the Bankruptcy Code establishing the priority of claims of the United States in bankruptcy proceedings under Title 11 do not "eliminate, either partially or wholly, the priority of claims of the United States in non-bankruptcy proceedings." *United States* v. *Emory*, 314 U.S. 423, 427 (1941).

In 1982, Congress revised the federal priority statute as part of a general recodification of Title 31. See Act of Sept. 13, 1982, Pub. L. No. 97-258, § 3713, 96 Stat. 972. The 1982 revision was not intended to make any substantive change in the statute. See H.R. Rep. No. 651, 97th Cong., 2d Sess. 1, 3-4, 134 (1982).

The purpose of the federal priority statute is to "secure an adequate revenue to sustain the public burdens, and discharge the public debts." *United States* v. *State Bank*, 31 U.S. (6 Pet.) 29, 35 (1832). See *Moore*, 423 U.S. at 82; *King* v. *United States*, 379 U.S. 329 (1964). That purpose is fundamental to the success of the national government. Accordingly, "it is established that the terms of [the priority statute] are to be liberally construed to achieve [its] broad purpose." *Key*, 397 U.S. at 324 (citing *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U.S. 483, 487 (1926); *Beaston* v. *Farmers' Bank*, 37 U.S. (12 Pet.) 102, 134 (1838)).

The Ohio priority statute ranks claims of the United States behind several other classes of claims against insolvent insurance companies, including claims of general business creditors. Similar priority statutes enacted by other States also subordinate claims of the United States to other claims.[4]

[4] The state priority statutes at issue in *Gordon* and *Soward* provide additional examples. See Md. Ins. Code Ann. §§ 158-158A (1991) (assigning fourth priority to claims of the United States as policyholder); Idaho Code § 41-3342 (Supp. 1990) (assigning fifth priority to claims of the United States). See also Uniform Insurers Liquidation Act §§ 6-8, 13 U.L.A. 321-353 (1986); National Association of Insurance Commissioners, Insurers' Supervision, Rehabilitation, and Liquidation Model Act § 42 (1979).

In the courts below, the government argued that even if the Ohio statute governs the priority of claims of the United States, the government's claims are entitled to third priority under the Ohio statute as policyholders' claims. The courts below did not address that argument.

Under the state priority statutes, the United States would often recover little or nothing on claims—including tax claims—against insolvent insurers. The effect on the federal revenue would be significant. Nearly $11 million is at stake in this case alone. The amount of revenue at issue has increased as the rate of insurance company insolvencies has increased. See generally Staff of House Comm. on Energy and Commerce, 101st Cong., 2d Sess., *Failed Promises: Insurance Company Insolvencies* 2 (Comm. Print 1990) (noting that nearly half of 150 property-casualty insurance company insolvencies since 1969 occurred within the last five years, and that insurance company assessments to cover the costs of insolvencies totalled $900 million in 1987, nearly half the total assessments of $2.2 billion for the period from 1969 to 1987).

2. The federal priority statute, by its terms, applies to the claims at issue in this case. Those claims plainly are "claims of the United States Government." In addition, an Ohio court has determined that ADIC is insolvent, has ordered that ADIC be liquidated, and has appointed respondent to serve as liquidator. "The appointment of a receiver under such circumstances is among the most common examples of an 'act of bankruptcy.'" *United States* v. *Emory*, 314 U.S. 423, 426 (1941). Accordingly, the federal priority statute applies to the government's claims—and preempts inconsistent state law—unless the McCarran-Ferguson Act, 15 U.S.C. 1012, requires a different result. See *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963).

See Pet. App. 23a (court of appeals remands for entry of judgment "pursuant to Ohio law"); *id.* at 45a (district court "need not address the arguments of the parties as to the priority given to the claims of the federal government under Ohio Rev. Code § 3903.42").

B. A State Statute Establishing the Priority of Claims Against An Insolvent Insurance Company Is Not a Law "Regulating the Business of Insurance"

The McCarran-Ferguson Act provides that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance." 15 U.S.C. 1012(b); App., *infra*, 2a. This Court described the narrow reach of that clause in *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 459-460 (1969), stating that McCarran-Ferguson

> did not purport to make the States supreme in regulating all the activities of insurance *companies*; its language refers not to the person or companies who are subject to state regulation, but to laws "regulating the *business* of insurance." Insurance companies may do many things which are subject to paramount federal regulation; only when they are engaged in the "business of insurance" does the statute apply.

Consistent with that reading of the language, this Court has repeatedly held that federal law governs the propriety of a variety of corporate activities conducted by insurance companies. See *Union Labor Life Ins. Co.* v. *Pireno*, 458 U.S. 119 (1982) (insurer's use of peer review committee to determine whether particular charges are covered by an insurance policy is not the business of insurance); *Royal Drug*, 440 U.S. at 230 n.38 (holding that price agreements between insurers and pharmacies are not the business of insurance and observing that among the "aspects of insurance companies [that] are regulated by state law, but are not the 'business of insurance,'" are "the composition of their boards of directors, when their books and records could be inspected, how they could invest their funds, [and] when they could liquidate or merge"); *SEC* v.

National Securities, Inc., supra (state regulation of an insurance company merger is not the business of insurance).

The state law at issue here purports to eviscerate the superiority of the federal government's claims to the proceeds derived from liquidation of a defunct insurance company. The plain language of McCarran-Ferguson demonstrates that such a statute does not regulate the "business of insurance."

1. "[T]he starting point in a case involving construction of the McCarran-Ferguson Act, like the starting point in any case involving the meaning of a statute, is the language of the statute itself." *Royal Drug*, 440 U.S. at 210. See also *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 541 (1978). McCarran-Ferguson provides that no Act of Congress shall preempt a state statute "enacted * * * for the purpose of regulating the business of insurance," unless the federal law "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The Ohio priority statute cannot reasonably be viewed as a law "enacted * * * for the purpose of regulating the business of insurance."

Ohio's priority statute does not regulate the terms of insurance policies, the selling and advertising of insurance, or any other commercial activity of insurers. Indeed, the statute is not even addressed to insurance companies. Instead, the statute is a bankruptcy law directed at the "estate" of the company (Ohio Rev. Code Ann. § 3903.42 (Anderson 1989)). It comes into play only when an insolvent insurance company's business has been wound up and its assets are distributed among its creditors. At that point, "[t]he only 'business' being conducted is the liquidation of a corporation which happens to have been an insurance company." *Idaho ex rel. Soward* v. *United States*, 858 F.2d at 452. The priority statute addresses the liquidator rather than the insurer, and instructs him to pay out the assets of the insolvent company to its creditors in the order of their priority. See *ibid.* (state priority statute speaks to "the

relationship between the insureds [and other creditors] and the government official charged with overseeing the liquidation of the insolvents.").[5] Regulation of the final distribution of liquidated assets—like regulation of when an insurance company may "liquidate or merge"—is an "aspect[ ] of insurance companies [that is] regulated by state law, but [is] not the 'business of insurance.' " *Royal Drug*, 440 U.S. at 230 n.38.

In *Pireno* and *Royal Drug*, the Court considered whether particular practices of insurance companies conducted in the ordinary course of their ongoing business operations were part of "business of insurance" under McCarran-Ferguson. In holding that the practices in issue were subject to paramount federal regulation, the Court developed a three-factor inquiry focusing on the nature of the insurance company practice at issue. See *Pireno*, 458 U.S. at 129. Because the Ohio priority statute does not address insurance companies or activities conducted in the ordinary course of their business, it plainly was not enacted for the purpose of regulating the business of insurance. Consequently, resort to the three-part *Pireno* test is unnecessary to resolve any ambiguity in the application of McCarran-Ferguson to this

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[5] The court of appeals believed that the priority statute regulates the business of insurance because "[o]nce an insurer is placed in receivership, only the sale of new policies is suspended during liquidation; the actual adjustment of claims and the payment of existing claims continue." Pet. App. 22a. The court of appeals' argument is a non sequitur. Although an insurance company that has been declared insolvent and placed under the control of a liquidator may continue to engage in aspects of the business of insurance during the liquidation, it does not follow that every state statute regulating the liquidation process is a statute "enacted * * * for the purpose of regulating the business of insurance."

statute.[6]

2. In any event, application of the tripartite *Pireno* test likewise leads to the conclusion that the Ohio priority statute does not regulate the business of insurance. *Pireno* considers: "*first,* whether the practice has the effect of transferring or spreading a policyholder's risk; *second,* whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third,* whether the practice is limited to entities within the insurance industry." *Pireno,* 458 U.S. at 129. Applying those factors, *Pireno* held that an insurer's use of a peer review committee in the ordinary course of business to determine whether certain chiropractic charges were covered by the insurance policy was not part of the business of insurance. Given that result, it would be anomalous to hold that rules governing a liquidator's distribution of assets to creditors in dissolution proceedings—rules that do not concern whether the policyholder has a contractual right to recover, or whether a particular claim is within the limits of the policy—are never-

[6] Ohio law itself appears to recognize a distinction between determining the priority of creditors' claims and regulating the business of insurance. The Ohio Code provides, in part:

> The purpose of sections 3903.01 to 3903.59 of the Revised Code is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers, through all of the following:
>
> * * * * *
>
> (4) Equitable apportionment of any unavoidable loss;
>
> * * * * *
>
> (6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.

Ohio Rev. Code Ann. § 3903.02(D) (Anderson 1989).

theless part of the "business of insurance." Moreover, consideration of each *Pireno* factor confirms that Ohio's statute does not regulate "the business of insurance." [7]

a. "The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk." *Royal Drug,* 440 U.S. at 211. Indeed, the Court has recognized that the spreading and underwriting of risk are "indispensable characteristic[s] of insurance." *Pireno,* 458 U.S. at 127 (citing *Royal Drug,* 440 U.S. at 212). See also 1 G. Couch, *Cyclopedia of Insurance Law* § 1.3 (2d ed. 1984) ("It is characteristic of insurance that a number of risks are accepted, some of which will involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it."); R. Keeton, *Insurance Law* § 1.2(a) (1971) ("Insurance is an arrangement for transferring and distributing risk.").[8]

[7] As the court of appeals recognized (Pet. App. 11a), the *Pireno* test is not limited to cases involving the antitrust laws. See *Pilot Life Ins. Co.* v. *Dedeaux,* 481 U.S. 41 (1987) (applying *Pireno* in ERISA context) *Metropolitan Life Ins. Co.* v. *Massachusetts,* 471 U.S. 724 (1985) (same). *Pireno* and *Royal Drug,* in turn, relied on cases involving the federal securities laws. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453 (1969); *SEC* v. *Variable Annuity Life Ins. Co. of America,* 359 U.S. 65 (1959).

[8] Risk-shifting (or underwriting) and risk-spreading (or risk distribution) are distinct concepts. "Shifting risk entails the transfer of the impact of a potential loss from the insured to the insurer." *Clougherty Packing Co.* v. *Commissioner,* 811 F.2d 1297, 1300 (9th Cir. 1987). Risk spreading entails "[i]nsuring many independent risks in return for numerous premiums. * * * By assuming numerous relatively small, independent risks that occur randomly over time, the insurer smoothes out losses to match more closely its receipt of premiums." *Ibid;* see also *Royal Drug,* 440 U.S. at 211-212. Both risk shifting and risk spreading are essential characteristics of insurance. See *Helvering* v. *La Gierse,* 312 U.S. 531, 539 (1941) ("Historically and commonly insurance involves risk-shifting and risk-distributing. * * * That these elements * * * are essential to a life insurance contract is agreed by courts and commentators.").

In *SEC* v. *Variable Annuity Life Ins. Co. of America*, 359 U.S. 65, 71 (1959), the Court held that variable annuity contracts are not insurance because they "place[ ] all the investment risk on the annuitant and none on the company." *Royal Drug*, 440 U.S. at 212. "Central to the Court's holding" in the *Variable Annuity* case was the principle that "the concept of 'insurance' involves some investment risk-taking on the part of the company." *Royal Drug*, 440 U.S. at 212 (quoting *Variable Annuity Life Ins. Co. of America*, 359 U.S. at 71). Because variable annuities involved "no true underwriting of risks," the Court concluded that they lacked "the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." 359 U.S. at 73.

The Ohio priority statute does not result in any underwriting or investment risk-taking by the insurance company. The policyholders and other creditors of an insurance company, rather than the insurance company, bear the risk that their claims will not be paid if the company becomes insolvent. This risk of nonpayment arising out of a default by a debtor is common to a multitude of contractual arrangements; it is not in any way an essential characteristic of the "business of insurance." The Ohio statute merely determines the priority of the creditors' claims in the event the company is liquidated. The statute thus does not regulate the "true underwriting of risks, the one earmark of insurance." *Variable Annuity Life Ins. Co. of America*, 359 U.S. at 73.

The Court's discussion of risk transfer in *Pireno* confirms that the State's assignment of priority to claims against an insolvent insurer does not involve any such transfer. In *Pireno*, the Court explained that "[t]he transfer of risk from insured to insurer is effected by means of the contract between the parties – the insurance policy – and that transfer is complete at the time that the contract is entered." 458 U.S. at 130. The Court concluded that the use of peer review to determine whether a particular claim fell within the limits of an insurance policy "is logically and temporally unconnected to the transfer of risk accomplished by [the] insurance policies." *Ibid.* The Court rejected the view that "the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is settled." *Id.* at 131. The Court observed that such a view "is contrary to the fundamental principle of insurance that the insurance policy defines the scope of the risk assumed by the insurer from the insured." *Ibid.* The Ohio priority statute, like the peer review process at issue in *Pireno*, is "logically and temporally unconnected to the transfer of risk accomplished by [the] insurance polic[y]." *Ibid.* The risk of insurer insolvency is not a risk covered by the insurance policy. Consequently, there is no transfer of the risk of insurer insolvency from insured to insurer when at the time the parties enter the insurance contract – or, indeed, at any time.[9]

b. In addition, the Ohio priority statute is not integral to the contractual relationship between the insurance company and the insured. The Ohio statute plainly does not regulate the contract of insurance itself. And it is not the case that the Ohio statute "so closely affect[s] the 'reliability, interpretation, and enforcement' of the insurance contract * * * as to fall within the exempted area." *Royal Drug*, 440 U.S. at 216. The statute has nothing to do with whether the policyholder has a valid contractual claim against the

[9] Nor does the priority statute involve risk spreading – that is, the assumption of "numerous relatively small, independent risks that occur randomly over time" in return for numerous premiums. *Clougherty Packing Co.*, 811 F.2d at 1300. Each creditor faces the risk that the insurance company will become insolvent; thus, the risks are not independent, and losses due to insolvency do not occur randomly over time. Rather than spreading risk, the priority statute merely determines the order in which creditors' claims will be paid.

insurer. Rather, the statute comes into play only in the event that the insurance company becomes insolvent and is liquidated. At that point, there is no longer a relationship between the policyholder and there is nothing the liquidator "could do to make the defunct entity a reliable insurer." *Idaho ex rel. Soward* v. *United States*, 858 F.2d at 453. Indeed, the Ohio priority statute does not even address the relationship between the insurance company and the insured. Instead, it addresses the relationship between policyholders and other creditors of insolvent insurance companies. See *id.* at 454 (priority statute "address[es] * * * the relationship [among] those left in the lurch by the expiration of the insurer").

To be sure, the Ohio priority statute affects the risk that a policyholder's claims will not be paid in the event the insurance company becomes insolvent. But as the Court observed in *Royal Drug*, an argument that such an effect is sufficient to bring the statute within the McCarran-Ferguson Act exemption "proves too much." 440 U.S. at 216. Virtually all government regulation of insurance companies has some impact on a policyholder's risk of nonpayment. For example, regulation of the cost-cutting measures at issue in *Royal Drug*, and the peer review system at issue in *Pireno*, affected insurer costs, and therefore the risk that the insurer would be unable to pay claims. As the Court noted in *Royal Drug*, "[m]any aspects of insurance companies are regulated by state law, but are not the 'business of insurance.' " 440 U.S. at 230 n.38 (citing as examples "how [insurance companies] could invest their funds, when they could liquidate or merge, as well as how they could purchase goods and services"). Consequently, the Ohio statute is properly viewed as one of many state laws applicable to insurance companies that are not integral to the contractual relationship, even though they may affect the probability that future policyholder claims will be paid.

c. The Ohio priority statute plainly is not limited to entities in the insurance industry. As the court of appeals recognized (Pet. App. 23a), the statute governs the rights of *all* creditors of insolvent insurance companies, including general business creditors, stockholders, and employees, as well as government entities. Moreover, a priority statute is not a regulation that is peculiar to the business of insurance. Instead, it is a standard feature of bankruptcy laws.

The court of appeals nevertheless concluded that the statute is limited to entities in the insurance industry because it "focus[es]" on the protection of policyholders. *Id.* at 23a. That conclusion is flawed for two reasons. First, the Ohio statute does not "focus" exclusively on the protection of policyholders. It is a comprehensive ordering of all classes of claims against an insolvent insurance company. The Ohio statute itself states expressly that its broad purpose is "the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers." See Ohio Rev. Code Ann. § 3903.02(D) (Anderson 1989); App., *infra*, 4a. The Ohio statute ranks two classes of claims – administrative expenses and wages – ahead of policyholder claims. See *id.* at 3a-4a. And it ranks claims of general creditors *behind* claims of policyholders but *ahead* of government claims. *Id.* at 4a. A policy of protecting policyholders cannot justify that result.

Second, the relevant question under this Court's decisions is not whether the statute "focus[es]" on policyholders, but whether it is limited to entities within the insurance industry. The Ohio priority statute does not meet the third *Pireno* criterion because, as the court of appeals acknowledged (Pet. App. 23a), it "necessarily involves the claims of non-policied creditors."

In sum, the Ohio priority statute flunks *Pireno*'s three-part test for determining whether a statute regulates the

business of insurance. Accordingly, the federal priority statute governs the priority of claims of the United States against an insolvent insurance company.

C. The Enactment History of McCarran-Ferguson Supports the Conclusion that the Federal Preemption Statute Applies to Claims Against an Insolvent Insurer

This Court's prior decisions construing McCarran-Ferguson have elaborately considered the measure's enactment history. See *Royal Drug*, 440 U.S. at 217-230; *Barry*, 438 U.S. at 546-550; *SEC* v. *National Securities, Inc.*, 393 U.S. at 458-460. In this case, that history strongly reinforces the conclusion that the Ohio priority statute does not regulate the "business of insurance."

1. Congress adopted McCarran-Ferguson in 1945 in response to the Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). See *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538 (1978). Prior to *South-Eastern Underwriters*, it had been assumed for more than 70 years that "[i]ssuing a policy of insurance is not a transaction of commerce." *Paul* v. *Virginia*, 75 U.S. (8 Wall.) 168, 183 (1868). Because insurance was not viewed as part of interstate commerce, "the States enjoyed a virtually exclusive domain over the insurance industry." *Barry*, 438 U.S. at 539. In *South-Eastern Underwriters*, however, the Court held that insurance transactions are subject to federal regulation under the Commerce Clause, and that Congress did not intend to exempt the business of insurance from the provisions of the Sherman Act. The Court's decision in *South-Eastern Underwriters* "provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *Barry*, 438 U.S. at 539.

Congress reacted swiftly to *South-Eastern Underwriters* by enacting McCarran-Ferguson. The purpose of the Act "was stated quite clearly in its first section; Congress declared that 'the continued regulation and taxation by the several States of the business of insurance is in the public interest.' " *National Securities*, 393 U.S. at 458 (quoting 15 U.S.C. 1011). The Act was thus "an attempt to turn back the clock" to pre-*South-Eastern Underwriters* days. *National Sec.*, 393 U.S. at 459. See *FTC* v. *Travelers Health Ass'n*, 362 U.S. 293, 299 (1960). As the House Report stated:

> It [was] not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *South-eastern Underwriters Association* case.

H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945). See also 90 Cong. Rec. 6524 (1944) (statement of Rep. Walter) ("[T]he legislation * * * is designed to restore to the status quo the position the insurance business of this Nation occupied before the Supreme Court recently legislated [in *South-Eastern Underwriters*]."). Accordingly, "[t]he McCarran-Ferguson Act should be read as protecting the right of the States to regulate what they traditionally regulated." *Royal Drug*, 440 U.S. at 218 n.18.[10] The Act is thus addressed to the distribution, between the States and the federal government, of power to tax and regulate commerce consisting of the business of insurance – not to the long-

[10] To be sure, McCarran-Ferguson did not simply overrule the Court's decision in *South-Eastern Underwriters*. Prior to *South-Eastern Underwriters*, insurance company boycotts, coercion, and intimidation did not violate the federal antitrust laws, because insurance was not thought to be part of interstate commerce. For the same reason, it was thought that Congress lacked power to regulate the business of insurance, and therefore federal laws did not apply to the business of insurance even in the absence of state regulation. See *Royal Drug*, 440 U.S. at 220 & n.24; *id.* at 205, 237-238 & n.4 (Brennan, J., dissenting); see 91 Cong. Rec. 478 (1945). Although McCarran-Ferguson thus departed from pre-

standing authority of the federal government to adopt rules pursuant to its power under the Bankruptcy Clause.

This reading of McCarran-Ferguson strongly reinforces the conclusion that the Ohio statute does not regulate the "business of insurance" because the States did not "traditionally" have "the right * * * to regulate" the priority of United States' claims in insurance liquidation proceedings. Construing McCarran-Ferguson to preclude application of the federal priority statute to federal claims against an insolvent insurer would "clothe the States with * * * power to regulate * * * the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." H.R. Rep. No. 143, *supra*, at 3.

Prior to *South-Eastern Underwriters*, the Court held in *United States* v. *Knott*, 298 U.S. 544 (1936), that the federal insolvency statute applied in state court proceedings to liquidate an insolvent insurance company and preempted a state statute that provided for repayment of in-state creditors ahead of all other creditors. In *Knott*, the United States filed a claim for payment of judgments on bail bonds, and asserted that its claim was entitled to first priority under the federal priority statute. Despite the conflicting Florida statute, the Court concluded "that the claim presented is, in its nature, one entitled to priority." 298 U.S. at 548.[11]

South-Eastern Underwriters law in some respects, those differences are not relevant in this case.

[11] Prior to *South-Eastern Underwriters*, state courts also considered the applicability of the federal priority statute in insurance company insolvency proceedings, and held or assumed that the federal statute applied to claims of the United States. See *In re Casualty Co. of America*, 196 A.D. 175, 176-177 (1st Dep't), aff'd, 232 N.Y. 559, 561 (1921); *People* v. *Metropolitan Surety Co.*, 161 N.Y.S. 616 (1916). See also *Conway* v. *Imperial Life Ins. Co.*, 21 So. 2d 151 (La. 1945); *Fred L. Emmons, Inc.* v. *Union Indemnity Co.*, 175 A. 141 (N.J. 1934). State courts reached the same result following passage of the McCarran-

The court of appeals' efforts to distinguish *Knott* are unpersuasive. The court observed that "McCarran-Ferguson did not return to the *status quo* prior to *South-Eastern Underwriters*; instead, it only permitted state regulation of the 'business of insurance' without federal interference." Pet. App. 14a (citing *Royal Drug*, 440 U.S. at 220 n.24). But as we have explained, see note 9, *supra*, the differences between McCarran-Ferguson and the law prior to *South-Eastern Underwriters* do not affect the application of the federal priority statute to claims against insolvent insurers. Moreover, the court of appeals' reliance on *Royal Drug* is misplaced. The passage cited by the court of appeals concluded only that McCarran-Ferguson "embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws – a concept that had prevailed before the *South-Eastern Underwriters* decision." 440 U.S. at 220. The Court thus recognized in *Royal Drug* that McCarran-Ferguson did not restore all of the regulatory authority that the States had enjoyed prior to *South-Eastern Underwriters*; the Court did not suggest that McCarran-Ferguson granted the States additional regulatory authority beyond that which they had "traditionally" possessed. 440 U.S. at 218 n.18.

The court of appeals also sought to distinguish *Knott* on the ground that "the Florida statute at issue in *Knott* contained only generalized provisions protecting domestic creditors in Florida insurance companies over foreign creditors; it in no way regulated the 'business of insurance' for the protection of the insured." Pet. App. 14a. But the Florida statute at issue in *Knott*, like the Ohio statute in

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Ferguson Act. See *In re Union Indemnity*, 551 N.Y.S.2d 446 (Sup. Ct. 1990), aff'd *sub nom. Curiale* v. *United States*, 566 N.Y.S.2d 853 (App. Div. 1991), petition for cert. pending, No. 91-1347; *Langdeau* v. *United States*, 363 S.W.2d 327 (Tex. Civ. App. 1962).

this case, addressed the claims of all creditors of an insolvent insurance company. Moreover, the Florida statute, as interpreted by the Florida courts, entitled "obligees on Florida surety bonds and surety contracts" (*i.e.*, policyholders) "to preferential payment in advance of other claims of a subordinate order, such as claims of Florida creditors in general." *Kelly* v. *Knott*, 163 So. 64, 68 (Fla. 1935). Accordingly, the "focus" of the Florida statute at issue in *Knott* was not significantly different from the "focus" of the Ohio priority statute in this case.

2. Consideration of McCarran-Ferguson's broader purposes leads to the same conclusion. "The primary concern of Congress in the wake of [*South-Eastern Underwriters*] was in enacting legislation that would ensure that the States would continue to have the ability to tax and regulate the business of insurance." *Royal Drug*, 440 U.S. at 217-218. As the Court has explained, "[t]he problem was that if insurance was interstate commerce, then the constitutionality of state regulation and taxation would be questionable." *Id.* at 218 n.16 (citing S. Rep. No. 20, 79th Cong., 1st Sess. 2 (1945); H.R. Rep. No. 143, 79th Cong., 1st Sess. (1945)). The issue in this case is simply whether the federal priority statute, implementing the longstanding congressional power to establish bankruptcy laws, applies to claims of the United States against insolvent insurance companies. Resolution of that narrow issue in favor of the United States will not call into question the States' broad authority to tax and regulate the business of insurance or the distribution of power to tax and regulate commerce effected by the McCarran-Ferguson Act.

Finally, the Court has recognized that an additional concern of Congress in enacting McCarran-Ferguson "was the applicability of the antitrust laws to the insurance industry." *Royal Drug*, 440 U.S. at 218. The antitrust exemption was directed primarily at cooperative ratemaking, "[b]ecause of the widespread view that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Id.* at 221. See also *Pireno*, 458

U.S. at 133. Neither the antitrust laws nor cooperative ratemaking are at issue here. Accordingly, application of the federal priority statute to claims of the United States against an insolvent insurance company is consistent with the purposes of the McCarran-Ferguson Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article VI of the United States Constitution provides, in part: "[T]he Laws of the United States * * * shall be the supreme Law of the Land."

2. The federal priority statute, 31 U.S.C. 3713, provides:

Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the government.

3. The McCarran-Ferguson Act, 15 U.S.C. 1011-1012, provides in part:

§ 1011. Declaration of policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by state law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) **State regulation**

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) **Federal regulation**

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance * * * unless such Act specifically relates to the business of insurance.

4. The Ohio Insurers Supervision, Rehabilitation and Liquidation Act, Ohio Rev. Code Ann. §§ 3903.02(D) and 3903.42 (Anderson 1989) provides:

§ 3903.42 Priority of distribution of claims.

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

(A) Class 1. The costs and expenses of administration, including but not limited to the following:

(1) The actual and necessary costs of preserving or recovering the assets of the insurer;

(2) Compensation for all services rendered in the liquidation;

(3) Any necessary filing fees;

(4) The fees and mileage payable to witnesses;

(5) Reasonable attorney's fees;

(6) The reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

(B) Class 2. Debts due to employees for services performed to the extent that they do not exceed one thousand dollars and represent payment for services performed within one year before the filing of the complaint for liquidationn. Officers and directors shall not be entitled to the benefit of this priority. Such priority shall be in lieu of any other similar priority that may be authorized by law as to wages or compensation of employees.

(C) Class 3. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property that are not under policies, and all claims of a guaranty association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values, shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligations of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No pay-

ment by an employer to an employee shall be treated as a gratuity. Claims under nonassessable policies for unearned premium or other premium refunds.

(D) Class 4. Claims of general creditors.

(E) Class 5. Claims of the federal or any state or local government. Claims, including those of any governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of such claims shall be postponed to the class of claims under division (H) of this section.

(F) Class 6. Claims filed late or any other claims other than claims under divisions (G) and (H) of this section.

(G) Class 7. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

(H) Class 8. The claims of shareholders or other owners.

§ 3903.02 Citation, construction and purpose of act.

(D) The purpose of sections 3903.01 to 3903.59 of the Revised Code is the protection of the interests of insureds, claimants, creditors, and the public generally, with minimum interference with the normal prerogatives of the owners and managers of insurers, through all of the following:

(1) Early detection of any potentially dangerous condition in an insurer, and prompt application of appropriate corrective measures;

(2) Improved methods for rehabilitating insurers, involving the cooperation and management expertise of the insurance industry;

(3) Enhanced efficiency and economy of liquidation, through clarification of the law, to minimize legal uncertainty and litigation;

(4) Equitable apportionment of any unavoidable loss;

(5) Lessening the problems of interstate rehabilitation and liquidation by facilitating cooperation between states in the liquidation process, and by extending the scope of personal jurisdiction over debtors of the insurer outside this state;

(6) Regulation of the insurance business by the impact of the law relating to delinquency procedures and substantive rules on the entire insurance business.